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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOHN YEE et al,

Petitioners,

vs.

CITY OF ESCONDIDO,

Respondent.

ON CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEALS FOR THE STATE OF CALIFORNIA

BRIEF FOR NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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STATEMENT OF INTEREST OF AMICUS CURIAE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

The New Jersey Department of the Public Advocate (hereinafter the "Department") is an independent cabinet-level department of New Jersey state government. N.J.S.A. 52:27E-2. It is mandated by statute to "represent the public interest in such administrative and court proceedings. . . as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as an interest arising from the Constitution, decisions of the courts, common law or other laws of the United States or of this State inhering in the citizens of this State or a broad class of such citizens." N.J.S.A. 52:27E-30. Since

its establishment in 1974, the Department has represented the interests of residents of New Jersey in a wide variety of areas including health, housing, income security, environment, and employment. It has come to play an important and continuing role in the protection and vindication of the interests and rights of the residents of New Jersey. See, e.g., Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 535-36, 416 A.2d 886, 893 (1980).

In this capacity, the Department has previously filed amicus briefs in cases before this Court. See, e.g., Fisher v. Berkeley, 475 U.S 260 (1986); United Building and Construction Trades Council v. Camden, 465 U.S. 208 (1984); Pennhurst State School v. Halderman, 451

U.S. 1 (1981); Kremens v. Bartley, 431 U.S. 119 (1977).

This case raises the issue of whether the combination of municipal rent control of mobile home parks without vacancy decontrol and state statutes protecting the right of mobile home owners living in mobile home parks to sell their own mobile homes violates principles of substantive due process under the Fourteenth Amendment to the Constitution or the prohibition on takings without just compensation under the Fifth and Fourteenth Amendments. It has broad consequences for residents of New Jersey.

Approximately 26,000 households in New Jersey reside in mobile homes. N.J. State Data Center, 1990 U.S. Census of Population and Housing, STF1, Profile 8 (1991). Approximately 90 percent of

these mobile homes are located in mobile home parks. Report and Recommendations of the Mobile Home Study Commission 93 (1980) (hereinafter "Mobile Home Report").[1] Following extensive study,

1. The Mobile Home Study Commission was established by the New Jersey Legislature. 1977 N.J. Laws, Jt. Res. No. 3. It was mandated to study the problems of restrictive zoning, regulation, financing, and taxation of mobile homes in New Jersey. Id. Its 250-page report provides a comprehensive picture of mobile homes and mobile home parks in New Jersey. The Legislature created a second commission, the Mobile Home Taxation Commission, specifically to study the issue of local taxation of mobile homes and mobile home parks. 1982 N.J. Laws, c. 204. Its report, Final Report of the Mobile Home Taxation Commission (1983) (hereinafter "Mobile Home Taxation Report"), together with the Mobile Home Commission Report, were the basis for a comprehensive package of legislation enacted by the New Jersey Legislature in 1983. 1983 N.J. Laws, cc. 386, 387, 388, 399, and 400 (codified in scattered sections of the New Jersey Statutes). The Legislature also had before it the decision of the New Jersey Supreme Court, Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J.

(Footnote continues on next page)

the New Jersey Legislature has adopted a comprehensive set of regulatory statutes governing mobile homes and mobile home parks. Affordable Housing Act of 1983, N.J.Laws, c.386 (codified at N.J.S.A. 40:55D-100 et seq.); Mobile Home Owners Rights Act, N.J.S.A. 46:8C-2 et seq., as amended by 1983 N.J.Laws, c. 399; 1983 N.J.Laws, c. 388 (codified as N.J.S.A 52:27D-121, regulating safety of mobile homes under the state construction code); 1983 N.J.Laws, c.400 (codified at N.J.S.A. 54:4-1.2 et seq., exempting

(Footnote continued from previous page)
158, 456 A.2d 390 (1983) (Mt. Laurel II), which analyzed mobile homes as a source of affordable housing, and a study prepared by the Center for Urban Policy Research of Rutgers-the State University at the joint request the New Jersey League of Municipalities and the New Jersey Builders Association, Burchell et at, Mount Laurel II: Challenge and Delivery of Low Cost Housing (1983) (hereinafter "Low Cost Housing").

mobile homes in mobile home parks from local property taxation and authorizing municipalities to charge mobile home owners service fees in lieu of property taxes).

Among other things, the New Jersey Legislature has prohibited evictions by mobile home park operators without just cause, N.J.S.A. 2A:18-61.1; prohibited park operators from refusing to rent spaces to purchasers of mobile home units in the park without just cause, N.J.S.A. 46:8C-3, and has delegated to municipalities the authority to regulate and license mobile home parks, N.J.S.A. 40:8C-8. Many of the municipalities that have concentrations of mobile home parks have exercised this delegated

power to regulate rents.[2] Few of these municipalities have elected to permit "vacancy decontrol."[3] The households who occupy these mobile homes thus have a large stake in the validity of this

2. There are 34 municipalities in New Jersey that have 200 or more mobile homes. Approximately 70 percent of all mobile homes in New Jersey are located in these communities. N.J.State Data Center, 1990 Census of Population and Housing, STF1, Profile 8 (1991). Of these, 17 municipalities have adopted rent regulations covering mobile home parks. N.J. Dept. Community Affairs, Rent Control Survey (1991). Approximately 10,000 mobile homes are located in these 17 municipalities. N.J.State Data Center, 1990 Census of Population and Housing, STF1, Profile 8 (1991).

3. "Vacancy decontrol" refers to provisions in some rent control regulations that permit the landlord to raise rents without limit any time the apartment (or, in this context, the mobile home pad) is vacant. Among the 17 municipalities in New Jersey with significant concentrations of mobile homes that regulate rents, only slightly more than a third (6) have vacancy decontrol. N.J. Dept. of Community Affairs, Rent Control Survey (1991).

comprehensive body of state and local regulation.

New Jersey's regulation of mobile homes and mobile home parks is essentially identical of that of California. In a recent decision, the Third Circuit Court of Appeals, adopting the legal theories advanced by petitioners in this case, held that mobile home park operators who challenged the combination of state regulation of mobile home parks and local rent regulation stated a valid claim of unconstitutional taking without just compensation. Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F.2d 347 (3rd Cir. 1989).

The Department has extensive experience and expertise in matters relating to affordable housing. Since its inception, it has represented the interests of lower income residents of

the state in a wide variety of legal and administrative proceedings to secure and protect their access to affordable housing. See, e.g., Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (Mt. Laurel I) (affordable housing in the suburbs); Mt. Laurel II, supra (same); Holmdel Builders Association v. Holmdel, 121 N.J. 550, 583 A.2d 277 (1990) (affordable housing trust funds); Prowitz v. Ridgefield Park Village, 122 N.J.199, 584 A.2d 782 (1991) (property taxation of low income housing).

In particular, the Department has extensive experience in matters relating both to rent regulation and to mobile homes. The Department of has represented the interests of New Jersey

residents in numerous proceedings involving the legality and implementation of municipal rent control ordinances. See, e.g., AMN, Inc. v. South Brunswick Township Rent Leveling Board, 93 N.J. 518, 461 A.2d 1138 (1983); Property Ownwers Association v. North Bergen, 74 N.J. 327, 378 A.2d 25 (1977); Hutton Park Gardens v. West Orange, 68 N.J. 543, 350 A.2d 1 (1975). It appeared as amicus curiae before this Court in a case involving the legality of municipal rent control in Fisher v. Berkeley, supra. It has also represented the interests of New Jersey residents in proceedings involving public law and policy affecting mobile homes and mobile home parks. See, e.g., Mount Laurel II, supra; Taxpayers Association of Weymouth Township v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976). It played an

active role in proceedings before both the Mobile Home Study Commission and the Mobile Home Taxation Commission.

The Department appears as amicus curiae to address the significance of municipal rent control to mobile home owners in New Jersey and the impact of a decision invalidating such ordinances on the grounds asserted by petitioners.

The Department submits this brief pursuant to Rule 37.5. It is a subdivision of the State of New Jersey. It is authorized to appear in its own name through the head of the agency, the Public Advocate of New Jersey. N.J.S.A. 52:27E-29, 32(b), 42.[4]

4. The Department does not appear in this matter on behalf of the State of New Jersey, which is represented solely by the Attorney of General of New Jersey. N.J.S.A. 52:27E-42.

SUMMARY OF THE ARGUMENT

The combination of local rent control of mobile home parks without vacancy decontrol and state statutes forbidding park operators from refusing to rent mobile home park pads to purchasers of mobile home units located in their parks represents a rational and carefully balanced policy of economic regulation designed to benefit both mobile home park owners and mobile home owners. New Jersey law in this area appears to be essentially identical to that of California. In New Jersey, however, the origins and rationale of this balanced policy are laid out with exceptional clarity in the reports of two legislative study commissions and a series of legislative enactments. The history of New Jersey's regulatory

legislation illuminates the policies underlying California's regulation.

In adopting these regulations, the New Jersey Legislature did not merely intend to keep down the costs of living in a mobile home. Rather these regulations were part of a larger legislative strategy designed to respond to a series of policy concerns: 1) in a time of housing shortage, mobile homes were insufficiently utilized as a source of affordable housing; 2) exclusionary zoning barred mobile homes from all but a few communities; 3) mobile home owners were perceived prejudicially as persons without any tangible stake in their communities or homes; 4) the prevalence of exclusionary zoning and "closed" parks gave park operators a degree of monopoly power over mobile home owners. It enabled park operators to exploit mobile

home owners through excessive rents and fees and arbitrary rules.

This comprehensive regulatory strategy sought to address all of these concerns. Necessarily this entailed striking a legislative balance among conflicting goals. As a result individual elements of the strategy, when viewed in isolation, may seem to conflict with some of these goals. Both municipal rent control without vacancy decontrol and the statute forbidding mobile home owners from refusing to rent to purchasers of mobile homes on site were designed to reduce the power of park owners to exploit mobile home owners and to eliminate specific abuses: the charging of excessive rents and extortionate fees and the arbitrary refusal by park owners to re-rent pads to purchasers of existing mobile home

owners in the park. The New Jersey Legislature appreciated that these regulations taken together might increase both the initial prices that park owners might charge for mobile homes and the prices the mobile home owners might charge on resale. The Legislature deemed this an acceptable trade-off for reducing the power of park owners to exploit mobile home owners. Other components of the regulatory strategy sought to reduce prices by increasing opportunities and incentives for the construction and expansion of mobile home parks and fostering increased competition among parks.

Substantive due process merely requires that economic regulations bear a rational relationship to legitimate

governmental purposes. Placed in context, these regulations easily satisfy that requirement.

These regulations do not effect a regulatory taking in violation of the Takings Clause. They do not deprive park operators of a fair return on their property. Even if the Takings Clause imposes a higher standard of judicial review of the wisdom or efficacy of economic regulations than principles of substantive due process, these regulations easily meet that standard.

Finally, these regulations do not effect a physical taking of petitioners' property. Property owners who operate mobile home parks do so for the purpose of renting pads to third parties. They voluntarily elect to permit third parties to occupy their property. They need not do so. They can take pads off

the market and occupy the property themselves or use it for some other purpose. When state law forbids a park owner from refusing to re-rent to the purchaser of a mobile home in the park except for just cause, it is not forcing the property open his property involuntarily to third parties. He has already elected to do so. The government is merely placing reasonable restrictions upon his <u>choice</u> of third parties. Such restrictions do not constitute a taking.

The purported additional profit that this regulatory scheme permits the seller of a mobile home to reap adds nothing to petitioners' case. This additional profit is solely the consequence of the regulatory scheme itself. If petitioners prevail and the regulatory scheme is struck down, the purported additional profit does not

fall to the park operator; it simply disappears. That the park operator's tenant might make an additional profit from the regulatory scheme does not deprive the park operator of anything that is rightfully his.

As illuminated by the legislative history of regulations in New Jersey, these regulations viewed in context are designed to foster the availability of mobile homes and mobile home parks as affordable housing while depriving park operators of the opportunity obtain excessive rents and fees. The regulations do not make park owners them bear any unfair burden, they merely restrict park owners to the profits they could make if economic markets functioned more freely and normally.

ARGUMENT

POINT I

THE COMBINATION OF STATE AND LOCAL REGULATION OF MOBILE HOMES REPRESENTS A RATIONAL AND CAREFULLY BALANCED POLICY OF ECONOMIC REGULATION AND IS A NEITHER A VIOLATION OF SUBSTANTIVE DUE PROCESS NOR AN UNCONSTITUTIONAL REGULATORY TAKING WITHOUT JUST COMPENSATION

A. The Combination of State and Local Regulation of Mobile Homes Represents a Rational and Carefully Balanced Policy of Economic Regulation

Contrary to the arguments of the petitioners, the combination of local rent control of mobile home parks without vacancy decontrol and state statutes forbidding park operators from refusing to rent mobile home park spaces to purchasers of mobile home units located in their parks represents a rational and carefully balanced policy of economic regulation designed to benefit both mobile home park owners and

mobile home owners. New Jersey law in this area appears to be essentially identical to that of California. See Pinewood Estates, 898 F.2d at 354. In New Jersey, however, the origins and rationale of this balanced policy are laid out with exceptional clarity in the reports of two legislative study commissions and a series of legislative enactments. The history of New Jersey's regulatory legislation illuminates the policies underlying California's regulation.

The New Jersey Legislature acted in response to four policy concerns. First, New Jersey suffers from an acute and continuing shortage of safe, decent affordable housing. Mobile Homes Report, supra at 2, 18-26, 29-33;

N.J.S.A. 40:55D-101(a)-(c).[5] Mobile homes potentially provide the most affordable non-subsidized housing available. Mobile Home Report, supra at 2, 52-57; Mobile Home Taxation Report, supra at 22; N.J.S.A 40:55D-101(e). In quality, modern mobile homes are virtually indistinguishable from conventional "stick-built" housing. Mobile Home Report, supra at 6; Mobile Home Taxation Report, supra at 22-24; N.J.S.A 40:55D-101(d). On-site, they appreciate steadily in value. Mobile Homes Report, supra at 195-96. It is

5. New Jersey continues to suffer from this housing shortage. A recent study by the state's Department of Community Affairs estimated that approximately 675,000 very low, low, and moderate income households in the state suffer from serious housing problems. N.J. Dept. of Community Affairs, State of New Jersey Comprehensive Housing Affordability Strategy (CHAS) 50 (Draft, August 21, 1991).

therefore desirable to foster the use of mobile homes and the creation of mobile home parks.

Second, mobile homes and mobile home parks have historically been a disfavored land uses in New Jersey. Mobile Home Report, supra at 61-132. More than 80 percent of all municipalities in state prohibit mobile home parks outright. Mobile Home Taxation Report, supra at 23. Those that permit them often do so on terms that are highly restrictive, for example limiting them to senior citizens. Mobile Home Report, supra at 99-103. As a result of these local exclusionary policies, mobile homes make up only a very small proportion of the housing stock and are concentrated in a handful of municipalities. Mobile Home Report, supra at 92-103; Mobile Home Taxation

Report, supra at 25; N.J.S.A 40:55D-101(d).[6]

Third, mobile home dwellers have historically been perceived as undesirable neighbors. They have been perceived as transients who have no stake in the community or even in their own homes. As a consequence, the perception has been that mobile home parks are a locus of undesirable (and perhaps criminal) activities and naturally and inevitably deteriorate into slums. Mobile Home Report, supra at 103-27. This perception is no longer accurate (if, indeed, it ever was). Mobile homes

6. Out of New Jersey's 567 municipalities, only 34 have more than 200 mobile homes. More than 70 percent of all mobile homes in the state are concentrated in these 34 communities. N.J. State Data Center, 1990 U.S. Census of Population and Housing, STF1, Profile 8 (1991).

are "mobile" more in name than in fact. The typical mobile home seldom leaves it original site during its useful life. Mobile Home Report, supra at 6; Cf. Koester v. Hunterdon County Board of Taxation, 79 N.J. 381, 386, 399 A.2d 656, 658 (1979) (describing difficulty and cost of removing a modern mobile home from its site). This perception must be overcome if mobile homes are to become a widely available housing option.

Fourth, approximately 90 per cent of all mobile homes in New Jersey are in mobile home parks. Mobile Homes Report, supra at 93. Mobile home owners and mobile home parks have a complicated relationship that leaves the mobile home owner potentially very vulnerable to exploitation by mobile home park operators.

Mobile home dwellers own their mobile homes. They rent "pads" from the mobile home park owner. The rental fee, however, does not include merely the physical space, but also a wide variety of services, including many services that other homeowners receive from municipal government, e.g., street maintenance, snow removal, street lighting, garbage removal, water and sewer service. Mobile Homes Taxation Report, supra at 13-14; N.J.S.A 54:4-1.3.

Many mobile home parks in New Jersey are "closed," i.e. one cannot bring a mobile home into the park. One must either purchase an existing mobile home in the park or purchase one from the park owner. See Hearing before the Mobile Home Taxation Commission 53-54 (May 19, 1983) (Statement of Emmanuel Brown, mobile home owner); Id. at 64-65

(Statement of Charles Reed, mobile home park developer and operator). The combination of exclusionary zoning and the prevalence of "closed" parks give the mobile home park owner a degree of monopoly power. He can price mobile homes well above the price a dealer could obtain. Mobile Home Report, supra at 61, Mobile Home Taxation Report, supra at 5-6, Low Cost Housing, supra at 364-65.

If the mobile home park owner evicts the mobile home owner and forces him to remove his mobile home, the mobile home owner loses, not only his place to live, but also most or all of the value of the mobile home, since the combination of exclusionary zoning and the prevalence of "closed" parks means that there is only a limited market in the state for used mobile homes not on a site. Indeed, the mobile home owner

cannot even move voluntarily without great financial loss, unless the park operator agrees to rent the pad to the buyer of the mobile home. This places the mobile home owner at the mercy of the park operator. It potentially permits the park operator to charge exorbitant rents. It also potentially permits him to charge extraordinary fees to permit the mobile home owner to sell his home on-site. As the Mobile Home Taxation Commission put it, the mobile home owner is a "captive" of the park operator. Mobile Home Taxation Report, supra at 5.

On the other hand, if the mobile home owner sells the unit, the purchaser, even if he intends to move it, may literally be unable to find another place to locate it. Mobile Home Taxation Report, supra at 5. The park operator,

not a party to this transaction, may find himself, however reluctantly, obliged to accept the new owner as a renter.

The New Jersey Legislature sought to respond to these concerns through a combination of means.

It permitted mobile home park operators to maintain closed parks as a fiscal incentive to encourage the establishment of mobile home parks. Park operators may exercise the exclusive right to make the first sale of a mobile home to be located on each pad. N.J.S.A. 46:8C-9.[7] The Legislature did so even though it understood that this would drive up the costs to the mobile home purchasers and impede the goal of

7. The Mobile Home Study Commission characterized this as authorizing a "modified closed park system." Mobile Home Report, supra at 63n.*.

making mobile homes a source of affordable housing.

The Legislature chose not to regulate the prices of mobile homes, either on initial sale or resale. Regulating the price on initial sale would have defeated the purpose of legitimating closed parks. The Legislature does not appear to have even entertained the idea of regulating resale prices. The Legislature was impressed by the fact that mobile homes on-site appreciate in value. Mobile Homes Report, supra at 195-96. Owners have a steadily increasing financial stake both in the mobile homes themselves and in the park in which they are located. The Legislature sought to foster this phenomenon as a means of countering the perception that mobile home dwellers are undesirable

neighbors. Regulating resale prices would have defeated this goal.

The Legislature required mobile home owners to submit prospective purchasers to the park operator for prior approval but prohibited mobile home park operators from refusing to rent pads to the purchasers of mobile home on site without good cause, N.J.S.A 46:8C-3(a), and prohibited operators from charging fees for agreeing to such rentals, N.J.S.A. 46:8C-2(e).

The Legislature also prohibited park operators from evicting mobile home operators except for good cause. N.J.S.A 2A:18-61.1.

The Legislature determined that mobile homes in mobile home parks should not be taxed as real property, since mobile home owners pay park operators for many services that other homeowners

receive from municipalities. N.J.S.A. 54:4-1.5. Instead, the Legislature authorized municipalities to charge service fees for those services that they do provide. N.J.S.A. 54:4-1.6

Finally, the Legislature authorized municipalities to regulate all aspects of the operation of mobile home parks, including rents. N.J.S.A. 46:8C-8.[8] Such rent regulation must assure the efficient operator a fair return, Mayes v. Jackson Township Rent Leveling Board, 103 N.J. 362, 366-67, 511 A.2d 589, 591 (1986), cert. denied,

8. The Mobile Home Taxation Commission, while acknowledging the arguments for comprehensive rent control of mobile homes, determined that this issue was beyond its mandate. Mobile Home Taxation Report, supra 5-6. In New Jersey, as in California, rent control has historically been a local function rather than a state function. See Inganamort v. Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973).

475 U.S. 1000 (1987), and must provide an administrative mechanism for resolving claims of hardship, Hutton Park Gardens, supra, 68 N.J at 575n.10, 350 A.2d at 18n. 10. Although the Legislature neither mandated nor prohibited vacancy decontrol, most municipalities that regulate rents in mobile home parks do not have vacancy decontrol. The policy rationale for this local legislative decision is clear. Rent control is intended to prevent the park owner to exploit his monopoly position to demand excessive rents from mobile home owners. Vacancy decontrol permits the park operator to demand such rents each time a pad is re-rented.

This complex body of state and local regulation, carefully tailored to balance the interests of park operators

and mobile home owners and to further the public policy of increasing the availability of mobile homes as affordable housing, has created a novel hybrid relationship between park operator and mobile home owner. The New Jersey Legislature clearly envisioned that these reforms would cause this relationship to evolve over time. It looked forward to the day when the absence of exclusionary zoning would vastly increase opportunities for development of mobile home parks and competition among park owners, perhaps obviating the need for such comprehensive state and local regulation.

The Legislature has actively sought to make this relationship beneficial to park owners. It has sought to foster greater opportunities for the creation and expansion of mobile home

parks by discouraging continuing exclusionary zoning. It has legitimized closed parks and permitted park owners to obtain an extraordinary profit in the initial sale of mobile homes. It has insulated park owners against some of the hazards of operation of mobile home parks. At the same time, by providing for state regulation or enabling municipal regulation, it has sought to diminish the vulnerability of tenants to exploitation by mobile home park operators.

B. The Combination of State and Local Regulation of Mobile Homes Does Not Violate Principles of Substantive Due Process.

The petitioners seek to extract two elements out of the complex regulatory relationship between park operators and mobile home owners and attack them in isolation. The petitioners

claim that the combination of state law forbidding park operators from refusing to rent to purchasers of mobile homes currently in the park without just cause and local rent regulation without vacancy decontrol fails to satisfy the minimum requirements of substantive due process.

As illuminated by the legislative history of these regulations in New Jersey, these arguments are clearly wrong. Petitioners assert that the only justification for these regulations would be to keep mobile homes affordable. That, however, is but one of the justifications for these regulations. The New Jersey Legislature had a more complex objective. It certainly desired to foster mobile homes as a source of affordable housing. It also sought simultaneously to encourage the

creation of mobile home parks, even if that had the effect of making mobile homes somewhat less affordable. It recognized that the prevalence of closed parks and exclusionary zoning made mobile home owners to some degree "captives" of park operators and sought to protect mobile home owners from park operators' exploitation of that fact to charge excessive rents and fees. It also sought to neutralize the impression that mobile home owners are transients without a stake in their homes, parks, or communities, and therefore to create circumstances in which mobile homes retain their value or appreciate. The goals are in conflict, and the Legislature was obliged to balance them, exercising its best legislative judgment.

Viewed in isolation, each of the provisions of the regulatory scheme may seem to conflict with some the legislative goals. The New Jersey Legislature appreciated that if park owners were given the exclusive right to sell mobile homes to renters of vacant pads, this might result in prices for new mobile homes rising. It deemed this an acceptable trade-off for giving property owners a fiscal incentive to construct mobile home parks. It appreciated that if the tax burdens of mobile home owners were reduced by substituting municipal service fees for real property taxes, the price of used (and even new) mobile homes might rise. It deemed this an acceptable trade-for a more equitable and consistent tax policy.

In general, the Legislature recognized that any public regulation that

increases the attractiveness of a particular park, whether it be exclusionary zoning that restricts competition or municipal rent control that reduce rent levels, could increase the price that purchasers of mobile homes on site would pay. In particular, it expressly acknowledged that one consequence of prohibiting park owners from refusing to rent to purchasers of mobile homes in the park was the this would increase both the initial price of mobile homes sold by the park operator and also the price on resales by mobile home owners. Mobile Home Report, supra at 63n.*. It was prepared to accept this possibility as a trade-off for depriving park owners of some of the benefits of the monopoly power that they otherwise held over mobile home owners.

Taken as a whole, however, the various components strike a balance that advances all the Legislature's purposes.

Thus, considered in the context of the regulatory scheme as a whole, the challenged provisions are rationally related to a legitimate governmental purpose. It is now well-established that government has broad discretion to engage in economic regulation, including regulations of price. Pennell v. San Jose, 485 U.S. 1, 11-14 (1988); Federal Communications Commission v. Florida Power Corp., 480 U.S. 245, 253 (1987); Olson v. Nebraska ex rel Western Reference and Bonding Ass'n, 273 U.S. 418 (1941); Nebbia v. New York, 291 U.S. 502 (1934). Courts have no power under the Due Process Clause to second-guess the wisdom or the probable efficacy of such regulatory policies.

So far as the requirement of due process is concerned, and in the absence of other consitutional restrictions, a state is free to adopt whatever economic policy may reasonable be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purposes. The courts are without authority either to declare such policy; or, when it is declared by the legislature, to overrule it. If the laws passed have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders the court functus officio. . . . With the wisdom of the policy adopted, with the adequacy or practicality of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. [Nebbia, 291 U.S. at 537.]

As this Court recently reaffirmed in Pennell, supra, and Florida Power Corp., supra, this doctrine applies to rent control and other economic regulation of real property, just as to regulation of prices of personal

property and services. Where the legislature has made a determination that economic conditions, such a housing shortage or monopolization of the market, make renters vulnerable to excessive demands for rents or fees, the Court has uniformly upheld governmental regulation of rents. Pennell, supra; Florida Power Corp., supra; Bowles v. Willingham, 321 U.S. 503 (1944); Block v. Hirsh, 256 U.S. 135 (1921). The Court has similarly upheld regulation limiting the power of property owners to terminate rental agreements or to refuse to re-rent where such regulation is an integral element of the legislatively chosen economic and regulatory policy. Block v. Hirsh, supra; Marcus Borwn Holding Co. v. Feldman, 256 U.S. 170 (1921), cf. Fresh Pond Shopping Center v. Callahan, 464 U.S. 875 (1983)

(dismissing for want of federal question appeal challenging termination provisions of municipal rent regulation as violating the Takings Clause).

As set forth above, regulation of the rents of pad in mobile home parks, prohibiting termination of rental agreements without good cause, and requiring park owners to rent to purchasers of mobile homes already in the park are all part of carefully balanced and tailored regulatory strategy designed to advance legitimate legislative purposes. As such, they are satisfy the requirements of the Due Process Clause.

C. The Combination of State and Local Regulation of Mobile Homes Is Not an Unconstitutional Regulatory Taking Without Just Compensation.

The petitioners alternatively cast their substantive due process arguments as a claim that the challenged combination of state and local regulations is an unconstitutional regulatory taking without just compensation. Citing Nollan v. California Coastal Commission, 483 U.S. 825 (1987), they suggest if the same arguments are asserted under this alternative label, the standard of review is more stringent: the regulation must not merely be rationally related to a legitimate governmental purpose but must "substantially advance" that purpose.

This analysis is unsound as a matter of law. The enhanced standard of

review enunciated in Nollan does not apply to generic claims of regulatory taking. It applies rather to instances where government seeks to accomplish a physical taking that would otherwise be a per se violation of the Takings Clause, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), but seeks to do so indirectly--not by seizing the property interest outright, but conditioning receipt of some benefit, such a approval for certain types of development, upon the property owner "voluntarily" ceding the property interest. As a threshold question, the courts must determine whether the condition has some public policy justification, whether it "substantially advances a legitimate state interest." Nollan, 483 U.S. at 434-36.

Expanding this enhanced standard of review to encompass generic claims of regulatory taking is inconsistent with sound principles of federalism and separation of powers. Nearly any claim that economic regulations violate substantive due process can be recast as a claim of regulatory taking. The courts, however, have no more competence or authority to review the wisdom or efficacy of governmental economic and regulatory policies when those policies are challenged under the rubric of "regulatory taking" than when they are attacked under the rubric of "substantive due process." The principles of federalism and separation of powers that counsel deference to legislative judgment where claims are made under the Due Process Clause counsel the same deference when the

identical claims are made under the Takings Clause.

This Court has consistently held that economic regulation of landlord tenant relationships is not a per se taking, even when it diminishes the profit or freedom of choice of the property owner. Pennell, 485 U.S. at 12n. 6; Florida Power Corp., 480 U.S. at 250-53; Loretto, 458 U.S. at 440. Except where the regulation effects a physical taking of the property,[9] the Takings Clause requires only that the regulation not deprive the property owner of a reasonable economic return in light of all the relevant circumstances. Florida Power Corp., 480 U.S. at 253-54; Permian Area Basin Cases, 390 U.S. 747,

9. As discussed below, this regulation does not effect a physical taking of petitioners' property.

768-69 (1968). It imposes no heightened standard of judicial review of the wisdom or efficacy of the regulation.[10]

The petitioners do not claim that the combination of state and local regulation challenged in this proceeding deny them a reasonable economic return on their property. They claim merely that they are not being permitted to realize the value potentially added to their property by the very regulations they are attacking. They contend that the combination of rent regulation without vacancy decontrol and the statute forbidding park operators from refusing to re-rent a pad to the purchasers of the mobile home selected by

10. To the extent that dictum in Nollan suggests otherwise, 483 U.S. at 834n. 3, the Department urges Court not to follow that dictum.

the current owner increases the resale value of mobile homes that are located on pads in regulated parks.[11] They complain that their property has been taken because any such windfall accrues to the mobile home owner not to the park operator.

As the Court of Appeals noted in Pinewood Estates, there is no logical reason to believe that the park owners are any worse off under this combination of state and local regulation than they would be under a pure rent control ordinance, i.e., without vacancy decontrol

11. Since this case was dismissed by the trial court on demurrer, the Court must assume for purposes of this appeal that this is so. It is not self-evident, however, that the rent control has an impact on mobile home resale prices different in kind or magnitude from other public policies, such as exclusionary zoning, legitimation of closed parks, or variation among municipalities in the level of service fees in lieu of taxes.

and without restrictions on their power to evict or to refuse to re-rent to purchasers of existing mobile homes. In that case, they they could freely evict mobile home owners, force the owners to remove their homes, and rent to other mobile homeowners chosen by the park operator at the regulated rent levels. There would be no windfall, even under petitioners' analysis, and petitioners would have no claim under the Takings Clause. 898 F.2d at 353n. 10. The mobile home owner might be worse off, but the park owner would be no better off.[12]

12. The petitioners challenge the combination of the state statute regulating rerental of to purchasers of mobile homes and the absence of vacancy decontrol in the local rent regulations. Obviously they would prefer the remedy of institution of vacancy decontrol by the municipality. They are not, however,

(Footnote continues on next page)

As this scenario illustrates, the purported windfall petitioners claim to be deprived of is over and above the reasonable economic return to which they are entitled. It can give rise to no legitimate claim of regulatory taking.

Moreover, the challenged provisions clearly satisfy the Nollan standard. The Court emphasized in Nollan that

> Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a

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(Footnote continued from previous page) entitled to this remedy, even if they prevail. The state and local legislative bodies could choose to preserve the local rent regulations intact and repeal or modify the state regulatory statute.

> broad range of governmental purposes and regulations satisfies these requirements. [483 U.S. at 834-35 (footnote and citations omitted)]

As illuminated by the legislative history of the identical regulations in New Jersey, the regulations challenged here, taken in the context of the state regulatory strategy as a whole, are carefully tailored to balance a complex set of legitimate governmental purposes. Even if the regulations seem to achieve none of these purposes perfectly when viewed in isolation, when considered together they contribute substantially to the accomplishment of the entire set of governmental purposes. Since they substantially advance legitimate state interests and do not deprive petitioners of a fair economic return, they do not constitute an unconstitutional regulatory taking.

In sum, the challenged regulations do not violate consitutional principles of substantive due process and are not unconstitutional regulatory takings.

POINT II

THE COMBINATION OF STATE AND LOCAL REGULATION OF MOBILE HOME PARKS DOES NOT CONSTITUTE AN IMPERMISSIBLE PHYSICAL TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKINGS CLAUSE.

Petitioners' contention the challenged regulations constitute an unconstitutional physical taking centers on the state statute that forbids mobile home park operators from refusing without just cause to rent pads to purchasers of mobile homes currently in the park. Petitioners contend that this permits third parties to occupy their property involuntarily in violation of

the Takings Clause as construed in Loretto, supra.

This analysis is unsound as a matter of law. Property owners who operate mobile home parks do so for the purpose of renting pads to third parties. They voluntarily elect to permit third parties to occupy their property. They need not do so. They can take pads off the market and occupy the property themselves or use it for some other purpose.[13] When state law forbids a

13. In this respect this case is different from Fresh Pond Shopping Center, supra. In that case, the Court held that a challenge under the Takings Clause to a municipal rent control ordinance that prohibited evictions except for cause and prohibited the property owner from taking the property off the rental market and using it for some other purpose so long as any of the tenants continued to reside in the building raised no substantial federal question. In the present case, neither state nor local regulation denies the

(Footnote continues on next page)

park owner from refusing to re-rent to the purchaser of a mobile home in the park except for just cause, it is not forcing the property open his property involuntarily to third parties. He has

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(Footnote continued from previous page) park operator of the right to take his property out of use as a mobile home park and put it some other use.

Amicus curiae Manufactured Housing Association in New Jersey, Inc. suggests that, at least in New Jersey, mobile home park operators do not actually have the option of turning his property to some other use. It contends that municipalities have zoned, or would zone, existing mobile home parks for use solely as mobile home parks, leaving park operators with no other option. As documented at length by New Jersey Mobile home Study Commission, the reality is that, far from mandating that property be used for mobile home parks, few municipalities in the state even permit its use for that purpose. Mobile Home Report, supra at 92-103. Many existing parks are non-conforming or conditionally permitted uses. Id. at 103n.**. Municipalities are, if anything, all too eager to have them converted to other uses. Thus, this suggestion has no basis in reality.

already elected to do so. The government is merely placing reasonable restrictions upon his choice of third parties.

This Court has previously upheld state laws that restrict the choice of property owner as to which third parties he will permit to occupy his property against claims under the Takings Clause, both in the context of rent regulation, Block v. Hirsh, supra, and in other contexts, e.g., PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Heart of Atlanta Motel v. United States, 379 U.S. 241, 259-60 (1964). As the Court observed in Florida Power Corp., it is the element of "required acquiesence" to the occupation by a third party that is the essence of an impermissible physical taking. 480 U.S. at 252.

The importance of this element is illustrated by Loretto and Florida Power Corp. In the former case, the government granted a cable company the right to put cable lines on the roof an apartment building, over the owner's objections. The Court struck that down as an impermissible physical taking. In the latter case, the power company offered to rent space for cable lines on its poles, but the government set a rent level much lower than that demanded by the power company. The Court upheld this regulation. [14]

> Appellees contend, in essence, that it is a taking under Loretto for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. [Florida Power Corp., 480 U.S. at 252]

14. Because the government regulations in Florida Power Corp did not require the power company to renew or accept assignment of rental agreements, the Court did not have occasion to comment on the significance of its analysis to that issue. Florida Power Corp., 480 U.S. at 251n. 6.

The purported additional profit that this regulatory scheme permits the seller of a mobile home to reap adds nothing to this analysis. As discussed above, this additional profit is solely the consequence of the regulatory scheme itself. If petitioners prevail and the regulatory scheme is struck down, the purported additional profit does not fall to the park operator; it simply disappears. That the park operator's tenant might make an additional profit from the regulatory scheme does not deprive the park operator of anything that is rightfully his.

The Takings Clause is ultimately concerned with preventing government

"from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318-19 (1987). As documented in the history of the New Jersey regulations, mobile home park owners have been the beneficiaries of public policies that have given them a degree of monopoly power and enabled them to charge extraordinary rents and demand extraordinary fees to the detriment of the public. The complex body of state and local regulation adopted by California and New Jersey is designed to foster the availability of mobile homes and mobile home parks as affordable housing while depriving park operators

of the opportunity obtain these excessive rents and fees. It is not making them bear any exceptional burden, merely restricting them to the profits they could make if economic markets functioned more freely and normally. As Justice Scalia observed in Pennell:

> When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free market operates, its is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling them out to relieve it may not be regarded as "unfair." [485 U.S. at 20 (Scalia, J., dissenting)]

As illuminated by legislative history in New Jersey, just such considerations motivated regulations challenged here.

CONCLUSION

For all the foregoing reasons, the Public Advocate respectfully urges this Court to affirm the decision of the California Court of Appeals.

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